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Lei Lin Thai v Public Prosecutor

B HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–84–09 OF 2015
NORDIN HASSAN JC
30 MARCH 2016

C *Criminal Procedure — Charge — Application to strike out — Applicant charged with offence of acquisition of shares whilst in possession of insider information pursuant to s 188(2)(a) of the Capital Markets and Services Act 2007 — Whether charges contravened art 8(1) of the Federal Constitution — Whether charges defective and illegal — Whether charges oppressive, vexatious and an abuse* D *of court process — Capital Markets and Services Act 2007 s 188(2)(a)*

The applicant was charged at the Kuala Lumpur Sessions Court with 53 charges for the offence of acquisition of shares in TH Group Bhd whilst in possession of insider information pursuant to s 188(2)(a) of the Capital E Markets and Services Act 2007 ('the CMSA'). Prior to the commencement of the trial, the applicant filed the present application seeking the court's orders to strike out all the charges and to discharge and acquit him of all the charges. The grounds to strike out all the charges were that: (a) the charges against the applicant contravened art 8(1) of the Federal Constitution ('the Constitution'); F (b) the charges were defective and illegal both in substance and form; and (c) the charges were oppressive, vexatious and an abuse of the judicial and legal process.

Held, dismissing the application:

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(1) From the analysis of ss 188 and 201 of the CMSA, it is clear that these provisions apply to any person who contravenes the said provisions which relates to insider trading. The impugned law applies to everybody who contravenes the said law and it is not discriminatory in nature. Further, as there were different parties exercising their power or rights to H take action against any person who commits an offence which relates to insider trading under the said sections, thus, the contention of any discrimination was devoid of any merit. This was not a situation where there were different set of procedures or rules to be considered by the same authority (see paras 21 & 23). I

(2) The basis of classification in the present case was certainly related to the object of ss 188 and 201 of the CMSA. Further, classification which is based on difference in circumstances of the case does not infringe art 8(1) of the Constitution. In the present action, the decision was made based

on the circumstances of the case, thus, the decision was clearly a reasonable classification which did not affect the validity of the impugned law. As such, s 188 of the CMSA did not contravene art 8(1) of the Constitution (see paras 34–35 & 40–41).

(3) The charges in the present case coincided with s 188(2)(a) of the CMSA which create the offence as stated in the said charges. Therefore the contention by the applicant that there was no offence known and the charges should be under s 188(2)(b) was untenable. With regard to the issue of whether the applicant was charge in his capacity as principle or agent, applying the principle in *Public Prosecutor v Ahmad bin Shafie* [1988] 1 MLJ 255, the words 'whether as principle or agent' under s 188(2) were not the element of the charge and its omission in the said charges did not affect the legality of the charges (see paras 53 & 56–58).

(4) It is not a requirement under the law to state in the charges as to which limb of the information under s 183 the applicant was charged. Moreover, the meaning of information under the said section is not exhaustive as the word 'includes' is use in this section. Thus it was not necessary or the requirement to specify in the charges under which limb of the information the applicant was charged (see paras 61–62).

(5) The decision on the nexus between the information and the effect on the value of the share could only be made after having examined the evidence adduced during trial. It is settled law, that with the leave of the court, the prosecution can amend the charges at any stage of the trial as provided under ss 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162 and 173(h)(ii) of the Criminal Procedure Code ('CPC'). Furthermore, even if there was any error or omission in the 53 charges against the applicant, it was not material unless the applicant was misled by the said error or omission. Thus, it was premature at this stage for the applicant to contend any error or omission in the charges that had misled the applicant or occasioned a failure of justice against the applicant (see paras 64–70).

(6) In the instant case, the acquiring of shares by the applicant occurred on different dates with different amount of shares and involving different accounts. The acquiring of shares on a certain date as reflected in the charge was by itself a complete offence under s 188(2)(a) of the CMSA although it involved a same information. All the offences on the different dates constituted a distinct offence and as such, the 53 charges were in compliance with s 163 of the CPC (see para 74).

(7) The court's duty is to apply the law and to give effect to the said provision and in this case s 188(2)(a) of the CMSA. As to whether the provision of the law is harsh, oppressive or unjust is to be debated in Parliament. Further, there was nothing to show that the delay in taking action against

A the applicant was actuated by mala fide. The court found that the applicant had failed to established that the charges against him were oppressive and an abuse of court process (see para 78 & 80–81).

[Bahasa Malaysia summary

B Pemohon dipertuduh di Mahkamah Sesyen Kuala Lumpur dengan 53 pertuduhan untuk kesalahan pemerolehan saham TH Group Bhd sementara memiliki maklumat dalaman menurut s 188(2)(a) Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP'). Sebelum permulaan perbicaraan, pemohon memfailkan permohonan ini menuntut perintah mahkamah untuk
C membatalkan kesemua pertuduhan dan untuk melepaskan dan membebaskannya daripada semua tuduhan. Alasan-alasan untuk membatalkan semua pertuduhan adalah bahawa: (a) pertuduhan terhadap pemohon melanggar perkara 8(1) Perlembagaan Persekutuan
D ('Perlembagaan'); (b) pertuduhan tersebut adalah cacat dan menyalahi undang-undang dari segi asas dan bentuk; dan (c) pertuduhan tersebut menindas dan menyusahkan dan merupakan penyalahgunaan proses kehakiman dan undang-undang.

E **Diputuskan**, menolak permohonan:

(1) Daripada analisis ss 188 dan 201 APMP, adalah jelas bahawa peruntukan-peruntukan ini terpakai kepada mana-mana orang yang melanggar peruntukan tersebut yang berkaitan dengan perdagangan orang dalam. Undang-undang yang dipersoalkan terpakai kepada semua
F orang yang melanggar undang-undang tersebut dan undang-undang tersebut tidak bersifat mendiskriminasi. Selanjutnya, memandangkan terdapat beberapa pihak yang berbeza melaksanakan kuasa atau hak mereka untuk mengambil tindakan terhadap mana-mana orang yang melakukan kesalahan yang berkaitan dengan perdagangan orang
G dalaman di bawah seksyen-seksyen tersebut, dengan itu, anggapan sebarang diskriminasi adalah tanpa merit. Ini bukanlah satu keadaan di mana terdapat beberapa set prosedur atau kaedah-kaedah berbeza yang perlu dipertimbangkan oleh pihak berkuasa yang sama (lihat perenggan 21 & 23).

H (2) Asas klasifikasi dalam kes ini sememangnya berkaitan dengan tujuan ss 188 dan 201 APMP. Selanjutnya, klasifikasi yang berasaskan perbezaan dalam keadaan kes tidak melanggar perkara 8(1) Perlembagaan. Dalam tindakan ini, keputusan tersebut dibuat berdasarkan kepada keadaan kes
I tersebut, dengan itu, keputusan tersebut jelas merupakan klasifikasi munasabah yang tidak menjejaskan kesahan undang-undang yang dipersoalkan. Oleh itu, s 188 APMP tidak melanggar perkara 8(1) Perlembagaan (lihat perenggan 34–35 & 40–41).

(3) Pertuduhan di dalam kes ini bertepatan dengan s 188(2)(a) APMP yang

mewujudkan kesalahan tersebut sebagaimana yang dinyatakan dalam pertuduhan. Oleh itu dakwaan oleh pemohon bahawa tiada kesalahan yang diketahui dan pertuduhan perlu berada di bawah s 188(2)(b) adalah tidak dapat dipertahankan. Berhubung dengan isu sama ada pemohon dipertuduh dalam kapasitinya sebagai sebagai prinsipal atau ejen, dengan mengaplikasikan prinsip dalam *Public Prosecutor v Ahmad bin Shafie* [1988] 1 MLJ 255, perkataan 'sama ada sebagai prinsipal atau ejen' di bawah s 188(2) bukanlah elemen pertuduhan dan peninggalannya dalam pertuduhan tersebut tidak menjejaskan kesahan pertuduhan (lihat perenggan 53 & 56–58).

(4) Bukanlah satu keperluan di bawah undang-undang untuk menyatakan dalam pertuduhan tentang di bawah bahagian mana maklumat di bawah s 183 pemohon didakwa. Lebih-lebih lagi, maksud maklumat di bawah seksyen tersebut tidak lengkap kerana perkataan 'termasuk' digunakan dalam seksyen ini. Oleh itu adalah tidak penting atau perlu untuk menyatakan dalam pertuduhan di bawah bahagian mana maklumat berhubung pemohon didakwa (lihat perenggan 61–62).

(5) Keputusan mengenai pertalian antara maklumat dan kesan ke atas nilai saham hanya boleh dibuat setelah memeriksa keterangan yang dikemukakan semasa perbicaraan. Undang-undang terpakai adalah bahawa dengan kebenaran mahkamah, pihak pendakwaan boleh meminda pertuduhan pada mana-mana peringkat perbicaraan sebagaimana yang diperuntukkan di bawah ss 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162 dan 173(h)(ii) Kanun Tatacara Jenayah ('KTJ'). Selanjutnya, walaupun sekiranya terdapat sebarang kesilapan atau peninggalan dalam 53 pertuduhan terhadap pemohon, hal tersebut bukanlah penting melainkan jika pemohon dikelirukan oleh sebab kesilapan atau peninggalan tersebut. Oleh itu, adalah terlalu awal pada peringkat ini bagi pemohon untuk menegaskan sebarang kesilapan atau peninggalan dalam pertuduhan yang telah mengelirukan pemohon atau menyebabkan kegagalan keadilan terhadap pemohon (lihat perenggan 64–70).

(6) Dalam kes ini, pemerolehan saham oleh pemohon berlaku pada tarikh yang berbeza dengan jumlah yang berbeza saham dan melibatkan akaun-akaun yang berbeza. Pemerolehan saham pada tarikh tertentu seperti yang digambarkan dalam pertuduhan dengan sendirinya merupakan satu kesalahan lengkap di bawah s 188(2)(a) APMP walaupun kesalahan tersebut melibatkan maklumat yang sama. Kesemua kesalahan pada tarikh yang berlainan merupakan satu kesalahan yang berbeza dan oleh itu, 53 pertuduhan tersebut mematuhi s 163 KTJ (lihat perenggan 74).

(7) Kewajipan mahkamah adalah untuk mengaplikasikan undang-undang dan untuk memberi kesan kepada peruntukan tersebut dan dalam kes ini

s 188(2)(a) APMP. Sama ada peruntukan undang-undang tersebut kasar, menindas atau tidak adil adalah untuk dibahaskan di Parlimen. Selanjutnya, tiada ada apa-apa yang menunjukkan bahawa kelewatan dalam mengambil tindakan terhadap pemohon telah digerakkan oleh mala fide. Mahkamah mendapati bahawa pemohon telah gagal untuk membuktikan bahawa pertuduhan terhadapnya adalah menindas dan merupakan penyalahgunaan proses mahkamah (lihat perenggan 78 & 80–81).]

Notes

For cases on application to strike out, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 1395–1397.

Cases referred to

Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v PP [2014] 1 MLJ 624, CA (refd)
Bird Dominic Jude v PP [2014] 3 MLJ 745, FC (refd)
Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155, FC (refd)
Haji Abdul Ghani bin Ishak & Anor v PP [1981] 2 MLJ 230, FC (refd)
Hui Chi-ming v R [1992] 1 AC 34, PC (refd)
Karpal Singh & Anor v PP [1991] 2 MLJ 544, SC (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)
Maganlal Chhagganlal (P) Ltd v Municipal Corporation of Greater 1974 AIR 2009, SC (refd)
Mannalal Khatic v The State AIR 1967 Cal 478, HC (refd)
Nadarajah v PP [2000] 4 MLJ 373, HC (refd)
Ooi Kean Thong & Anor v PP [2006] 3 MLJ 389; [2006] 2 CLJ 701, FC (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)
PP v Hii Sii Chang [1998] 6 MLJ 249, HC (refd)
PP v Pung Chen Choon [1994] 1 MLJ 566, SC (refd)
Peter Tham Wing Fai v PP [1988] 2 MLJ 424 (refd)
Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72, FC (refd)
PP v Ahmad bin Shafie [1988] 1 MLJ 255, SC (folld)
PP v Harmenderpall Singh a/l Jagara Singh [2007] 3 MLJ 433, CA (refd)
PP v Khong Teng Khen & Anor [1976] 2 MLJ 166, FC (refd)
PP v Sihabduin bin Haji Salleh & Anor [1980] 2 MLJ 273, FC (refd)
Ramesan v State of Kerala [2007] Cr LJ 1637, HC (refd)
Teng Kum Seng v PP [1960] 1 MLJ 225 (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 183, 183(a), (b), (c), (d), (e), (f), 187, 188, 188(1), (2), (2)(a), (2)(b), (4), 201, 201(1), (5), 205(5), (5)(a), (5)(b)
Courts of Judicature Act 1964 ss 26, 27, 50, 66, 67

Federal Constitutions art 8(1)
Criminal Procedure Code ss 152, 153, 153(1), 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 173(h)(ii), 422

Wong Chiang Kiat (Alex Tan Chie Sian with him) (Wong Kian Kheong) for the applicant.
Rozmawar bt Rozain (Hashley Tajuddin with her) (Deputy Public Prosecutors, Attorney General's Chambers) for the respondent.

Nordin Hassan JC:

INTRODUCTION

[1] On 29 January 2015, Lei Lin Thai, the applicant, was charged in the session court at Kuala Lumpur with 53 charges under s 188(2)(a) of the Capital Markets and Services Act 2007 ('the CMSA') and punishable under s 188(4) of the same Act.

[2] All the 53 charges preferred against the applicant are for the offence of acquisition of shares in TH Group Bhd whilst in possession of insider information.

[3] Before the commencement of the trial at the session court, the applicant filed this notice of motion dated 2 September 2015 seeking from this court the following orders:

(a) that all the charges preferred against the applicant under s 188(2)(a) of the CMSA and registered as Case Nos 62–01–01 of 2015 to 62–18–01 of 2015 ('the said charges') at the Kuala Lumpur sessions court be struck out;

(b) that the applicant be discharged and acquitted of all the said charges;

(c) that all proceedings at the Kuala Lumpur session court pertaining to the said charges be stayed and/or adjourned pending the final disposal of this application; and

(d) any other order or relief which this honourable court deems fair and just.

[4] The grounds to strike out the 53 charges are as follows:

(a) that the criminal charges preferred against the applicant contravened art 8(1) of the Federal Constitution;

(b) that the said charges are defective and illegal both in substance and form; and

(c) that the said charges are oppressive, vexatious and an abuse of the judicial and legal process.

THE APPLICANT'S CONTENTIONS

Article 8(1) of the Federal Constitution

[5] As regards the contravention of art 8(1) of the Federal Constitution, it was submitted by counsel for the applicant that any person who contravene s 188(2) of the CMSA would be liable to two different sets of punishment, namely under s 188(4) which is punishment for criminal offence or under s 201(5) which is recovery for loss and damages by instituting civil proceedings. Therefore, it was argued that since s 188 is more severe and drastic provision compared to s 201, s 188 is discriminatory.

[6] Counsel for the applicant further contends that there is no guideline provided under the CMSA to indicate as to the class of cases in which ss 188 or 201 is to be resorted to by the authority.

[7] As such, s 188 of the CMSA was submitted as void as it contravened art 8(1) of the Federal Constitution.

Defective and illegal charges

[8] On this issue, it was submitted that there is no offence known of 'acquiring of shares ... through a third party' under the CMSA. Section 188(2)(a) which the applicant was charged with, only stipulates that an insider shall not acquire any securities. In the present case, as stated in the charges that the securities were acquired through the account of a third party, it was argued that there is no offence revealed and as such the charges are defective.

[9] Counsel for the applicant submitted further that the correct subsection for this particular offence is sub-s (2)(b) of s 188 and not s 188(2)(a). It was submitted that the action of an insider acquiring any securities through a third party falls under s 188(2)(b) read together with the definition of 'procure' under s 187 of the CMSA.

[10] Apart from this, it was also argued by the counsel that all the charges has failed to mentioned whether the applicant was charged in his capacity as a principal or agent. As such the applicant is not in the position to answer the charges in the best way possible.

[11] Furthermore, the applicant's counsel submitted that the charges did not disclose elements of the offence and are vague as it did not reveal which limb of the 'information' under s 183 of the CMSA in which the applicant was charged. It was argued that as there are six limbs from para (a) to (f) in s 183 and some of the limbs are further subdivided into various types of information, therefore the charges should state clearly under which limb of the information which the applicant had contravened. Thus, failure to do so, resulted the charges against the applicant vague and ambiguous.

[12] Counsel for the applicant also submitted that the charges has not disclose the nexus between the information and the material effect on the price or value of the shares. It was argued that the information in all the charges concerned the proposed privatisation of TH Group Bhd and this has no connection with the price of value or shares.

[13] It was also argued by the applicant's counsel that there was only one information involved in all the 53 charges, therefore there can only be a single offence. The counsel for the applicant submitted that there was only a single activity involving 53 acts and as such they are not 53 distinct offences. Therefore the 53 charges preferred against the applicant contravened, inter alia, s 163 of the Criminal Procedure Code.

[14] It was also submitted that the 53 charges against the applicant are oppressive and an abuse of the court process. On this issue, it was argued that as the minimum fine for offence under s 188 is not less than one million ringgit and without a maximum fine, the legislature had envisaged only one offence when the penal section which is s 188(4) was enacted. It was argued further that it would be absurd that a person who transacted 2800 lots of shares in 53 transactions as in this case as compared to a person who transacted in 2800 lots of shares in one transaction, the former will be charged with 53 charges and if convicted be fined at least RM53m whereas the latter would face with only one charge and if convicted will only be fine for a minimum of 1m.

[15] On top of this, it was submitted that the offences occured in 2008 but the applicant was called for investigation purposes only in November 2012. This delay was argued has caused injustice to the applicant as he would not be in a position to recall any event which had occurred about five years before. Therefore, this amount to an oppressive and an abuse of the process of the court.

A DECISION OF THE COURT

Article 8(1) of the Federal Constitution

B **[16]** As mentioned earlier, one of the ground to strike out the charges against the applicant relates to the constitutionality of s 188(2) of the CMSA which was argued by counsel for the applicant that the said section contravened art 8(1) of the Federal Constitution.

C **[17]** Before I proceed further, for ease of reference, art 8(1) of the Federal Constitution and ss 188 and 201 of the CMSA are as follows:

(a) Article 8(1):

> All persons are equal before the law and entitled to the equal protection of the law.

D (b) Section 188 of the CMSA:

> 188 Prohibited conduct of person in possession of inside information
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> (1) A person is an '*insider*' if the person –
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> E (a) *possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities*; and
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> (b) knows or ought reasonably to know that the information is not generally available.
>
> F (2) An insider shall not, whether as principal or agent, in respect of any securities to which information in subsection (1) relates –
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> (a) *acquire* or dispose of, or enter into an agreement for or with a view to the acquisition or disposal of *such securities*; or
>
> G (b) *procure*, directly or indirectly, an acquisition or disposal or, or the entering into an agreement for or with a view to the acquisition or disposal of *such securities*.
>
> (3) Where trading in the securities to which the information in subsection H (1) relates as permitted on a stock market of a stock exchange, the insider shall not, directly or indirectly communicate the information referred to in subsection (1), or cause such information to be communicated, to another person, if the insider knows, or ought reasonably to know, that the other person would or would tend to –
>
> I (a) acquire, or dispose of, or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates; or
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> (b) procure a third person to acquire, disposed of or enter into an an agreement with a view to the acquisition or disposal of, any

securities to which the information in subsection (1) relates.

(4) A person who contravenes subsection (2) or (3) commits an offence and shall be punished on conviction to imprisonment for a term not exceeding *ten years* and to a fine of *not less than one million ringgit*.

(c) Section 201 of the CMSA:

201 Recovery of loss or damages

(1) 'A person' who suffers loss or damages by reason of, or by relying on, the conduct of another person who has contravened section 188 may recover the amount of loss or damages by instituting civil proceedings against the other person, whether or not the other person has been charged with an offence in respect of the contravention or, whether or not a contravention has been proved in a prosecution.

(2) In subsection (1), 'loss or damages' includes an unrealised loss or gain, as the case may be the price or value of securities of a corporation being the difference between –

(a) the price or value of securities in a transaction in connection with which the person first-mentioned in subsection (1) claims to have suffered loss or damages; and

(b) the price which would have been the likely price of the securities in the transaction, or the value which it is likely that such securities would have had at the time of that transaction, if the contravention had not occurred.

(3) Where an insider acquire, or procured another person to acquire or agree to acquire, securities from a person (the 'seller') who did not possess the information, in contravention of subsection 188(2), *the seller may, by civil action against the insider* or any other person involved in the contravention, recover, as a loss or damages suffered by the seller, the difference between –

(a) the price at which the securities were acquire, or agreed to be acquired, by the insider or the other person, from the seller; and

(b) the price at which the securities would have been likely to have to have been acquired at the time of the acquisition or agreement, as the case may be, referred to in paragraph (a) if the information had been generally available.

(4) Where an insider disposed of or agreed to dispose of, or procured another person to dispose of or agree to dispose of, securities to a person (the 'buyer') who did not possess the information, in contravention of subsection 188(2), *the buyer may, by civil action against the insider* or any other person involved in the contravention, recover, as a loss or damages suffered by the buyer, the difference between –

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(a) the price at which the securities were disposed of, by the insider or the other person, to the buyer; and

(b) the price at which they would have been likely to have been disposed of at the time of the disposal or agreement, as the case may be, referred to in paragraph (a) if the information had been generally available.

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(5) *Where an insider acquired or agreed to acquire*, or procured another person to acquire, securities, in contravention of subsection 188(2), and such securities were permitted to be traded on a stock market of a exchange, then, whether or not the insider or any other person involved in the contravention has been charged with an offence in recpect to the contravention or whether or not contravention has been proved in a prosecution, *the Commission may, if it considers that it is in the public interest to do so, by civil action against the insider or any other person involved in the contravention* –

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D

(a) recover an amount equal to three times the amount being the difference between the price at which the securities were acquired, by the insider or the other person, and the price at which they would have been likely to have been acquired at the time of the acquisition or agreement, as the case may be, if the information had been generally available; and

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(b) claim civil penalty in such amount as the court considers appropriate having regard to the seriousness of the contravention, being an amount not more than one million ringgit.

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[18] Having laid down the relevant laws on this issue, first and foremost, with regard to the constitutionality of a particular law, there is strong presumption of constitutionality of a law and the burden of proof is on the party seeking to establish the contrary. As was said by Justice Mohammad Dzaiddin in the case of *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116:

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> It should be borne in mind that there is a strong presumption of the constitutional validity of an enactment or the impugned section with the burden of proof on whoever alleges otherwise.

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(See also *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 and *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566).

I

[19] On the issue of equality before the law under art 8(1) of the Federal Constitution, it is instructive to refer to the Federal Court case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 where the pertinent principles of law has been laid down which are as follows:

(i) *the equality provision is not absolute. It does not mean that all laws must apply*

uniformly to all persons in all circumstances everywhere;

(ii) the equality provision is qualified. Specifically, discrimination is permitted within cl (5) of art 8 and within art 153;

(iii) the prohibition of unequal treatment applies not only to the legislature but also to the executive – this is seen from the use of the words 'public authority' in cl (4) and 'practice' in cl (5)(b) of art 8;

(iv) the prohibition applies to both substantive and procedural law;

(v) art 8 itself envisages that there may be lawful discrimination based on classification – thus Muslims as opposed to non-Muslims (para (b) of cl (5) of art 8); aborigines as opposed to others (para (c)); residents in a particular state as opposed to residents elsewhere (para (d)); and Malays and natives of Borneo as opposed to others who are not (art 153); and

(vi) in India the first question they ask is, is there classification? If there is and subject to other conditions, they uphold the law. If there is no classification, they strike it down.

> With respect we would agree with the solicitor-general's submission that *the first question we should ask is, is the law discriminatory, and that the answer then be – if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void*.

[20] On the same issue of equality before the law, it was explained further in the case of *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166 as follows:

> The principle underlying art 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it 'must be general in character and universal in application and that the state is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation', *Kedar Nath v State of West Bengal.*

[21] Having analysed the provisions of ss 188 and 201 of the CMSA, it is clear that these provisions apply to any person who contravenes the said provisions which relates to insider trading as defined under the CMSA. The impugned law applies to everyone who has committed the said offence and all those who infringe the said provisions can be taken criminal action under s 188(2) and punishable under s 188(4) or civil proceeding under s 201 of the CMSA. Therefore as the impugned law applies to everybody who contravene the said law, it is not discriminatory in nature (see *Datuk Harun bin Haji Idris*

v Public Prosecutor and *Bird Dominic Jude v Public Prosecutor* [2014] 3 MLJ 745).

[22] In the present case, any criminal action under s 188 is exercisable by the public prosecutor whereas the civil action under s 201(1) can be taken by any person who suffer loss or damages and apart from this, civil action under s 201(5) is exercisable by the security commission.

[23] As there are different parties excercising their power or rights to take action against any person who commits an offence which relates to insider trading under ss 188 or 201 of the CMSA, the contention of any discrimination is devoid of any merit. Here is not a situation where there are different set of procedures or rules to be considered by the same authority.

[24] In *Datuk Harun*'s case which quoted Khanna J in Indian Supreme Court case of *Maganlal Chhagganlal (P) Ltd v Municipal Corporation of Greater* 1974 AIR 2009 had this to say:

> ... I would, therefore, hold that the procedure envisage in the impugned provisions is not onerous and drastic as would justify an inference of discrimination. *The simple fact that there are two forums with different procedures would not justify the quashing of the impugned provisions as being violative of* Article 14*, especially when both procedures are fair and in consonance with the principles of natural justice.*

[25] On top of this, a law is a valid law even if the procedures in the provisions exist side by side provided that there is a guideline in class of cases in which either procedures to be resorted to and the impugned law contain provision for an appeal. This has been explained by Suffian LP in *Datuk Harun*'s case as follows:

> Where there are two procedures existing side by side, the one that is more drastic and prejudicial is *unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal*, so that a decision under it may be reviewed by a higher authority. *The guideline may be found in the law itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the law* (minority judgment in *NI Caterers* and judgment in *M Chhagganlal*). We think that we should follow the same principle.

[26] As explained by Suffian LP in *Datuk Harun*'s case, the guideline for the classification may be found in the law itself, or may be inferred from the objects and reasons of the bill, the preamble and the surrounding circumstances. Clearly there is no requirement under the law to have a written guideline or policy on this matter.

[27] On this issue of guideline, under s 205(5) of the CMSA, it provides that the security commission may take civil action, if it considers that it is in the public interest to do so to recover the amount as stated in s 205(5)(a) and civil penalty under sub-s (5)(b) of the CMSA. This is infact a guideline for the security commission to comply with before any civil action to be taken against any person.

[28] There is also the right to appeal with regard to any action taken under ss 188 and 201 of the CMSA as provided under ss 26, 27, 50 and 67 of the Courts of Judicature Act 1964.

[29] As there are guidelines in the impugned sections and also the right to appeal, therefore even if there are two sets of procedures exist side by side in the present case, it does not affect the validity of the law in question as explained in *Datuk Harun*'s case cited earlier.

[30] Moreover, our law accepted the doctrine of classification on the basis that the classification is permissible if it is founded on an intelligible differentia and the differentia has a rational relation to the object of the impugned law.

[31] The meaning of intelligible differentia and its application has been explained in the case of *Public Prosecutor v Harmenderpall Singh a/l Jagara Singh* [2007] 3 MLJ 433 as follows:

> [62] Going by the *Oxford English Dictionary*, 'intelligible' means: capable of understanding (not by senses) that may be apprehended by intellect, and 'differentia' means: *the attribute by which a species is distinguished from all other species of the same genus*; a distinguishing mark or character. *In this instance, the differentia must have a rational relation to the object sought to be achieved by the statute in question*. The classification may therefore be founded on a different basis, namely geographical or according to objects or occupations or the like. *What is necessary is that there must be a nexus between the basis of classification and the object of the Act. The classification should never be arbitrary, artificial or evasive*. It must rest always upon real and substantive distinction bearing a reasonable and just relation to the thing in respect to which the classification is made for otherwise the classification made would be without any reasonable basis – Mukherjee J in *Anwar All Sarkar's case* 1952 AIR 75 and quoted in *Public Prosecutor v Si Liang KM* [1976] 2 MLJ 128 at p 130.

[32] This doctrine of classification is further explained by Suffian LP in *Datuk Harun*'s case as follows:

> 7. *In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification*, using the words used in the passage reproduced above from the judgment in *Shri Ram Krishna Dalmia*, provided that:
>
> (i) *the classification is founded on an intelligible differentia* which distinguishes

persons that are grouped together from others left out of the group; and

(ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. *What is necessary is that there must be a nexus between the basis of classification and the object of the law in question*.

The solicitor-general submits that if the Indian doctrine of classification is to be accepted by our courts, which he argues has not been done, it may be accepted subject to the modification that the courts should not take it upon itself to consider whether the classification is reasonable or not, a task which should be left to the legislature. *In our opinion the doctrine of classification should be accepted by our courts*, subject to what we said in para 6 above. We adhere to what was said in *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166 at p 170.

[33] Thus, even if the impugned law is discriminatory in nature, it is still a good law if there is based on reasonable or permissible classification.

[34] In the present case, it is clear from the impugned sections that its objective, inter alia, are to curb the offence of insider trading, to recover the profit made by the offender, to allow more party to take civil action against the offender and to allow claims for losses and damages. The basis of classification in the present case, certainly relates to the object of the impugned law.

[35] Beside this, classification which is based on difference in circumstances of the case does not infringe art 8(1) of the Federal Constitutions. In the instant case, the decision to identify the difference in a particular case for criminal offence under s 188 is by the public prosecutor and for civil action under s 205(5) is by the security commission. A decision made which is based on the circumstances of a particular case such as in the present situation is clearly a reasonable classification.

[36] This principle of law is succinctly explained in the case of *Nadarajah v Public Prosecutor* [2000] 4 MLJ 373 at pp 381 and 382 as follows:

All that equality before the law requires is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration (see *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 500. Thus as Lord Diplock said in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, art 8(1) *of the Constitution does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed. The decision to identify the difference in the circumstances of a particular case and to act accordingly is that of the attorney general pursuant to* art 145(3) *of the Constitution and is not subject to judicial review* (see

Repco Holdings Bhd v Public Prosecutor [1997] 3 MLJ 681). In any event the exercise of the discretion by the attorney general to institute a prosecution against a person in a certain court, *dependent on the circumstances of that case, may itself amount to a reasonable classification for the purposes of* art 8(1) *of the Constitution.* Cases such as *Ramkrishna Dalmia v Tendolkar* [1959] SCR 279, *Govindlalji v State of Rajasthan* [1964] 1 SCR 561, *State of J & K v Golam Md* AIR 1967 SC 122, *Birakishore v State of Orissa* (1964) 7 SCR 32, *Mittal v Union of India* AIR 1983 SC I and *Lachman v State of Punjab* AIR1963 SC 222 support the proposition *that a classification may be reasonable even though a single individual is treated as a class of himself, if there are some special circumstances or reasons applicable to him alone and not applicable to others. The objection grounded on* art 8(1) *of the Constitution cannot therefore be sustained.*

[37] In the circumstance, the contention by the applicant that any person who contravenes s 188(2) of the CMSA is liable to two set of punishment namely under ss 188(4) and 201(5) of the same Act and as such contravenes art 8(1) of the Federal Constitution is without any merit.

[38] The applicant also has failed to show any bias consideration by the authority or arbitrary, artificial or evasive classification in implementing the impugned law. There is also no assertion by the applicant that he has been singled out with regard to the enforcement of the impugned sections in this case.

[39] In the case of *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389; [2006] 2 CLJ 701 Richard Malanjum FCJ (as he then was) had this to say:

As regards art 8 *judicial pronouncement on the scope of this article has been 'that equality before the law' requires that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decision whether or not to prosecute in a particular case for a particular offence should not be indicated by some irrelevant consideration.* Article 8(1) *does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed'* (see *Nadarajah v Public Prosecutor* [2000] 4 MLJ 373; [2000] 4 CLJ 634 and *Public Prosecutor v Tengku Mahmood Iskandar* [1973] 1 MLJ 128).

Hence *the reliance on* art 8 *by learned counsel in our view has no merit as there is no assertion that the applicants were singled out by DBKL in relation to the enforcement of the impugned by-law.* There was also no allegation that irrelevant consideration was taken into account when DBKL decided to issue the summons to the applicants.

Accordingly it is our judgment that the impugned by-law does not infringe any of the rights as enshrined in arts 5 or 8 of the Constitution.

[40] For the abovementioned reasons, I find the classification in the present

case are reasonable and permissible which does not affect the validity of the impugned law.

[41] As such, s 188 does not contravene art 8(1) of the Federal Constitution.

Defective and illegal charges

[42] Counsel for the applicant also submitted that the charges against the applicant are defective and illegal. The grounds for this contention are as follows:

(a) there is no offence of 'acquiring shares through a third party' under s 188(2)(a) of the CMSA;

(b) the charges failed to state whether the applicant was charged in his capacity as a principle or agent;

(c) the charges failed to reveal as to which limb of the information under s 183 of the CMSA the applicant was charged;

(d) the charges failed to show the nexus between the information and the material effect on the price or value of the said shares;

(e) the 53 charges related to one information and the 53 acts are one single activities. They are not 53 distinct offence but constitute one single offence; and

(f) the 53 charges against the applicant and the delay to complete the investigation and to take action against the applicant are oppressive and abuse of court process.

[43] On this issue, firstly, the purpose of a charge is to inform the accused as precisely and concisely as possible, the matter with which he is charged and the charge must convey to the accused with sufficient clearness and certainty what the prosecution intends to prove against him and to enable him to put up his defence (see *Ramesan v State of Kerala* [2007] Cr LJ 1637 and *Mannalal Khatic v The State* AIR 1967 Cal 478).

[44] On this purpose of a charge, Thompson CJ in *Teng Kum Seng v Public Prosecutor* [1960] 1 MLJ 225 at p 518 said this:

> The real test in all these cases is whether the accused person gets sufficient certain notice of what is charged against him.

[45] As regards the statute, ss 152, 153 and 154 of the Criminal Procedure Code stipulates the necessary features or contents in a charge. For ease of reference the said provisions are as follows:

(a) Section 152:

(1) Every charge under this Code shall *state the offence* with which the accused is charged.

(2) If the law which creates the offence gives it any *specific name the offence* may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name so much of the *definition of the offence* must be stated as to give the accused notice of the matter with which be is charged.

(4) The *law and section* of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) If the accused has been previously convicted of any offence, and it is intended to prove that previous conviction for the purpose of increasing the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If the statement is omitted the Court may add it at any time before sentence is passed.

(b) Section 153:

(1) The charge shall contain such particulars as to the *time and place of the alleged offence* and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 164:

Provided that the time included between the first and last of such dates shall not exceed one year.

(3) When the accused is charged with an offence relating to publication by electronic means, the place of publication is where the publication is seen, heard or read by any person.

(c) Section 154:

When the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with

which he is charged, the charge shall also contain *such particulars of the manner in which the alleged offence was committed* as will be sufficient for that purpose.

[46] Having laid down the law with regard to a charge, I now revert to the charges preferred against the applicant.

[47] In the present case, the 53 charges preferred against the applicant are similar except as to the date of acquisition of shares, number of shares and the accounts involved. Here, in considering the validity of the charges, it is pertinent to refer to the charges and one of the charge is as follows:

> That you on 5 June 2008 at Bursa Malaysia Securities Bhd (Company No 635998-W), Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur in the Federal Territory of Kuala Lumpur, *acquired 35,000 units of TH Group Bhd (Company No 183467-X) shares ('the said shares') through Chung Yin Mui's (NRIC No 510926–12–5254) Central Depository System* account bearing number 065–001–046841151 while *in possession of information that was not generally available* which on becoming generally available a reasonable person would expect it to have a *material effect on the price or the value of the said shares, such information being the proposed privatisation of TH Group Bhd* via a Selective Capital Repayment exercise and you ought reasonably to have known that such information was not generally available and you have thereby committed an offence under *s 188(2)(a) of the Capital Markets & Services Act 2007* (Act 671) and punishable under s 188(4) of the same Act.

[48] One of the ground putforth by the applicant with regard to the charges preferred against him is that there is no offence of 'acquiring of shares ... through a third party' under s 188(2)(a) of the CMSA and the correct subsection is (2)(b) of s 188.

[49] Now, to put matter in its perspective, it is pertinent to examine the said s 188(2) which is as follows:

> An insider shall not, whether as principal or agent, in respect of any securities to which information in subsection (1) relates –
>
> (a) acquire or dispose of, or enter into an agreement for or with a view to the acquisition or disposal of such securities; or
>
> (b) procure, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities.

[50] Reading the wordings of s 188(2)(a), what is clearly provided therein, inter alia, is that an insider, in respect of any securities to which information in sub-s (1) relates shall not acquire such securities. There is nothing in s 188(2)(a)

that requires a person to acquire the said securities himself or using his own account before he can be said to infringe the said provision.

[51] On this issue, the word 'acquire' is not defined in the CMSA but according to the *Oxford Dictionary*, it means 'come into possession; or gain by oneself. Hence, the meaning of 'acquire' is wide and includes anything obtained directly or indirectly. The word acquire in s 188(2)(a) is wide enough to cover the acquisition of shares through a third party.

[52] Moreover, as I find s 188(2)(a) is plain and unambiguous, it is my duty to give effect to it. As explained by the Federal Court in the case of *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273:

> The words of Lord Diplock in an authority cited by my Lord President, *Duport Steels Ltd v Sirs,* seem to me to be particularly apt, for 'the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral ...

[53] Here, the charges in this present case coincide with s 188(2)(a) of the CMSA which create the offence as stated in the said charges. Therefore the contention by the applicant that there is no offence known and the charges should be under s 188(2)(b) is untenable.

[54] The next ground forwarded by the applicant in this application is that the charges had failed to state whether the applicant was charge in his capacity as a principle or agent and this prevent the applicant to answer the charges in the best possible way.

[55] Having perused s 188(2) of the CMSA, I agree with the deputy public prosecutor that the words 'principle or agent' are not the element of the offence. These words 'whether as principle or agent' in the said section only to emphasise that an insider commits an offence whether he is the principle or an agent.

[56] In *Public Prosecutor v Ahmad bin Shafie* [1988] 1 MLJ 255, one of the question for the determination of the Supreme Court under s 66 of the Courts of Judicature Act 1964 is as follows:

> Whether a charge under s 39B of the Dangerous Drugs Act 1952 (Revised 1980) is defective in law if it is not specified therein the words '*on his own behalf or on behalf of any other person*'.

[57] On this question of law, Justice Salleh Abbas LP had this to say:

> The words 'on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia' appearing in s 39B of the Act *merely to emphasise that an offence is committed by any person who traffics in dangerous drugs whether on his own behalf or on behalf of any other person, whether the other person is in or outside Malaysia. In a sense, they are ex abundanti cautela. These words do not constitute an element which is essential to complete the offence and may be omitted from the charge without affecting the legality of the charge*. On the charge as framed against the respondent in this case, they do not even require proof to complete the offence.

[58] Hence, applying the same principle, the words 'whether as principle or agent' under s 188(2) are not the element of the charge and its omission in the said charges do not affect the legality of the charges.

[59] Counsel for the applicant further submitted that the charges failed to reveal as to which limb of the information under s 183 of the CMSA the applicant was charged.

[60] On this issue, information is defined under s 183 of the CMSA as follows:

> For the purposes of this Division, 'information' includes –
>
> (a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public;
>
> (b) matters relating to the intentions, or likely intentions, of a person;
>
> (c) matters relating to negotiations or proposals with respect to –
>
> (i) commercial dealings; or
>
> (ii) dealing in securities;
>
> (d) information relating to the financial performance of a corporation;
>
> (e) information that a person proposes to enter into, or has previously entered into one or more transactions or agreements in relation to securities or has prepared or proposes to issue a statement relating to such securities; and
>
> (f) matters relating to the future.

[61] Firstly, it is not a requirement under the law to state in the charges as to which limb of the information under s 183 the applicant was charged. It is not the element of the charge and moreover the meaning of information under s 183 is not exhaustive as the word 'includes' is use in this section. The word 'includes' is a word of extension and not of definition (see *Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor* [1981] 2 MLJ 230).

[62] Therefore, since the meaning of information under this section is not enhaustive, certainly it is not necessary or the requirement to specify in the charges under which limb of the said information the applicant was charged. What is important, the charges in the present case has detail out the information which the applicant possessed which is the proposed privatisation of TH Group Bhd. This is sufficient to give notice to the applicant of the matter with which the applicant was charged as required under s 153(1) of the CPC.

[63] Beside this, it was submitted that the charges failed to show the nexus between the information and the material effect on the price or value of the shares. Therefore the charges is unknown in law, unfair and prejudicial.

[64] On this issue, it is premature at this stage for the court to decide as the nexus between the information and the effect on the value of the share. This can only be made after having examined the evidence adduced during trial.

[65] Having read the charges against the applicant, it disclosed that on the relevant time and place, the applicant acquired the shares while in possession of information that was not generally available which on becoming generally available would have a material effect on the price or value of the said shares. Hence, the charges give adequate notice to the applicant of what he is charged with to enable him to prepare his defence. The charges therefore are in compliance with ss 152, 153 and 154 of the Criminal Procedure Code.

[66] On top of this, it is settled law, that with the leave of the court, the prosecution can amend the charges at any stage of the trial as provided under ss 152–162 and 173(h)(ii) of the Criminal Procedure Code. In the Court of Appeal case of *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v Public Prosecutor* [2014] 1 MLJ 624, a similar application to struck off the charges was filed by the accused on the ground of, inter alia, defective charges. On this issue, Azhar Mohamed JCA had this to say:

> [7] With respect, we are unable to agree with the contention of learned counsel for the appellant. In our view, the omission to state the mode in which the trust is to be discharged or of any legal contract made touching of the *trust is not fatal at this stage of the proceedings*. We agree with the submissions of Mr Kevin Morais, the learned deputy public prosecutor ('DPP') to the effect that *the prosecution during the course of the trial can amend and lead evidence to identify the breach*. In this regard, it is an established principle that with the leave of the court, the prosecution is entitled to amend the charges at any stage of the trial (see *Heng You Nang v Public Prosecutor* [1949] MLJ 285, *Public Prosecutor v Francis Dang anak Nuya* [1988] 1 MLJ 89, and *Public Prosecutor v Tan Kim Kang & Ors* [1962] MLJ 388). The rules governing amendment of charges are provided for in s 158–162 and in s 173(h)(ii) of the Criminal Procedure Code ('the CPC').

[67] Furthermore, even if there is any error or omission in the 53 charges against the applicant, it is not material unless the applicant was misled by the said error or omission. This is provided under s 156 of the Criminal Procedure Code which is as follows:

> No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

[68] Moreover, s 422 of the Criminal Procedure Code stipulates that any error or omission in the charge would not vitiate the proceedings unless such error or omission has occasioned a failure of justice.

[69] In relation to this, as to whether the error or omission has misled the applicant or has occasioned a failure of justice can only be determined at the conclusion of the trial as explained in Ahmad Zubir's case as follows:

> Furthermore, s 156 of the CPC *provides that no error in stating either* the offence or the particulars to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case, as material, unless the appellant was in fact *misled by that error or omission*. More than that, s 422 of the CPC provides that any error or omission the the charges would not vitiate the proceedings, unless such error or omission *has occasioned a failure of justice*. In our view, whether the appellant was misled by any error or omission in the charges or whether such error or omission has occasioned a failure of justice *can only be determined at the conclusion of the trial having regard to the entire evidence being placed before the trial judge*.

[70] Therefore, in the present case, it is premature at this stage,for the applicant to contend any error or omission in the charges that has misled the applicant or occasioned a failure of justice against the applicant.

[71] Counsel for the applicant also raised the issue that there should only be one charge instead of the 53 charges as all the charges are in relation to one information. It was argued that there is no 53 distinct offences in the case against the applicant.

[72] Regarding this contention, s 163 of the CPC provides:

> 163 Separate charges for distinct offences.
>
> For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 164, 165, 166 and 170.

[73] In *Peter Tham Wing Fai v Public Prosecutor* [1988] 2 MLJ 424, Chua J

explained the meaning of 'distinct offence' as follows:

> The question arises as to what is meant by '*every distinct offence*' in s 167 of the Criminal Procedure Code. '*Distinct' means 'not identical'. Two offences would be distinct if they are not in any way inter-related but if there is some inter-relation it would depend on the circumstances of the case in which the offences were committed whether there is only one transaction and only one offence was committed*.

[74] In the instant case, the acquiring of shares by the applicant occurred on different dates with different amount of shares and involving different accounts. The acquiring of shares on a certain date as reflected in the charge is by itself a complete offence under s 188(2)(a) of the CMSA although it involved a same information. All the offences on the different dates constitute a distinct offence and as such, the 53 charges are in compliance with s 163 of the CPC.

[75] In *Peter Tham Wing Fai*'s case, Justice Chua agree with the findings of the trial judge that there were 36 distinct offences of forgery and quoted with approval when the trial judge said this:

> *The forgery of each document, although completed within seconds of the next to be forged, was a separate act from the others and never depended on the completion of the others before being complete in itself*. The only connection between the forgeries was the proximity in time and a continuity of purpose that, at most, would qualify them as offences committed within the 'same transaction'. In any event, each share certificate and its corresponding 'blank tranfer' was to be used by Eng with as many banks or financial institutions as be thoudht fit to use, a fact that was also known to the accused.

Chua J then had this to say:

> The forging of each share certificate and each transfer form stands separately by themselves as separate and completed offences with the same punishments. The precise number of forgeries committed do not represent the component parts of any one offence. Each of the forgeries stands by itself.

[76] Likewise in the present case, the acquiring of the shares on a different time and dates while in possession of information which is not generally available is a separate and complete offence. It constitutes a distinct offence and as such the 53 charges were in compliance with s 163 of the Criminal Procedure Code.

[77] The applicant's counsel further argued that the 53 charges based on the 53 different transaction which the applicant can be subjected to a minimum fine of RM53m is oppressive vexatious and an abuse of of process. This is because if any other person who acquired the same amount of shares in a single

transaction he would only face with a fine of minimum RM1m.

[78] As regard this contention, first and foremost, s 163 of the CPC clearly provides that there shall be a separate charge for every distinct offence and each offence is provided with the sentence. Here, the court's duty is to apply the law and to give effect to the said provision and in this case s 188(2)(a) of the CMSA. As to whether the provision of the law is harsh, oppressive or unjust is to be debated in Parliament. This is clearly explained by Raja Azlan Shah in the case of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at p 188 as follows:

> The duty of the court is to implement the law. Whether it is harsh or unjust is to be debated in Parliament.

[79] Next, as to the issue of abuse of process, in *Hui Chi-ming v R* [1992] 1 AC 34 the term abuse of process was defined as 'something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respect a regular proceeding'.

[80] In the present case, there is nothing to show that the delay in taking action against the applicant was actuated by mala fide and there is also no time frame to commence a criminal proceeding against a person (see *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544 and *Public Prosecutor v Hii Sii Chang* [1998] 6 MLJ 249).

[81] I also find that the applicant has failed to established that the charges against him were oppressive and an abuse of court process.

CONCLUSION

[82] For the aforesaid reasons, the application by the applicant by way notice of motion dated 2 September 2015 is dismissed.

Application dismissed.

Reported by Dzulqarnain Ab Fatar